PERDANA PROPERTIES BHD.

v.

UNITED ORIENT LEASING CO. SDN. BHD.

PRIVY COUNCIL
LORD DIPLOCK
LORD RUSSELL OF KILLOWEN
LORD BRIDGE OF HARWICH
JOHN MEGAW
OWEN WOODHOUSE
[PRIVY COUNCIL APPEAL NO. 35 OF 1980]
15 OCTOBER 1981

CIVIL PROCEDURE: *Distress - Claim by owner for release of goods leased to tenant - Whether owner can apply for release of equipment - Distress Ordinance 1951, s. 10 - Whether excluded by s. 12 - Whether equipment in possession of tenant by consent and permission of owner - Whether consent effectively withdrawn - Whether lease agreement must have been terminated.*

The instant appeal involved a dispute between the appellant which sought to distrain for rent arrears on equipment used by its tenant ('Emporium') and the respondent which owned and had leased the said equipment to Emporium. Emporium had ran into financial difficulties and suffered judgments at the suit of some creditors. As it transpired, the equipment was seized in execution of those judgments under orders of the Sessions Court. The respondent then wrote to Emporium giving notice to the latter that it was assuming immediate possession of the equipment. Subsequently, the appellant took out a warrant of distress for rent arrears but it was discharged by the High Court at the instance of the respondent claiming ownership of the equipment. The appellant then took out another warrant of distress and served it on the bailiff of the Sessions Court.

In the meanwhile, the Sessions Court ordered the release of the equipment to the respondent but it was immediately afterwards seized under the appellant's second warrant of distress. Thereafter, the respondent issued an originating motion in the High Court seeking the release of the equipment in its favour. The motion was dismissed but the Federal Court allowed the respondent's appeal. The appellant then appealed to the Privy Council. The sole issue which fell for determination arose under ss 10 and 12 of the Distress Ordinance 1951 ('the Ordinance') in the light of the respondent's letter of notice to Emporium. Section 10 of the Ordinance allows any person (not being a tenant of the premises and having no beneficial interest in any tenancy of the premises) whose moveable property has been seized under a warrant of distress for the recovery of rent arrears to apply to a judge for the release of the distrained article. However, s. 12 of the Ordinance excludes goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.

Held:

Per Lord Russell of Killowen

[1] The whole question was whether the respondent's letter of notice to Emporium sufficiently indicated a withdrawal of consent to Emporium's continued possession of the equipment. Clearly, it did.

[2] The proposition that the relevant consent could not be withdrawn unless the lease agreement was terminated was unacceptable. The withdrawal of the respondent's consent was inherent in its letter of notice to Emporium. It could not be understood in any other sense by Emporium.

[Appeal dismissed.]

Cases referred to:
Times Furnishing Co. Ltd. v Hutchings [1938] 1 KB 775
Smart Bros. Ltd. v. Holt [1929] 2 KB 303

Legislation referred to:
Distress Ordinance 1951 (No. 28 of 1951), ss. 10, 12

For the appellant - John Stuart Coyer QC (Ong Ban Chai and G.S. Nijar with him); M/s. Nabarro Nathanson
For the respondent - Gerald Godfrey QC (Wong Kim Fatt with him); M/s. Coward Chance

JUDGMENT

Lord Russell of Killowen:

This appeal involves a dispute between the appellant, which sought to distrain for rent arrears on equipment used by its tenant Emporium President and Supermarket ("emporium") at Johore Tower, Johore Bahru, and the respondent which owned the equipment which it had leased to emporium for use in its trade at those premises. Potentially the case raised a number of questions, but in the opinion of their Lordships the answer to one question is fatal to the success of this appeal, and it is not proposed to discuss other questions that otherwise might have arisen.

Emporium ran into financial difficulties in 1979 and suffered judgments at the suit of one or more creditors. On 3 September 1979, the equipment and no doubt other articles at the premises had been seized in execution of those judgments under orders of the Sessions Court by the bailiff of that Court. On the same day the respondent wrote to emporium in the following terms:

3rd September 1979.

The Directors
Emporium President & Supermarket Sdn. Bhd.
Johor Tower Jalan Gereja
Johor Baru
Johor.

Dear Sirs,

Re: Lease Agreements: 79-183
79-199

It has come to our knowledge that your company's trading premises in the Johor Tower, Johor Baru, is the subject of orders of attachment by your creditors today.

Accordingly, in accordance with Article 21(b) of the lease agreements and also your failure to pay the overdue rents, we hereby, without prejudice to the terms and conditions of the above two (2) Lease Agreements, give you notice that as owner of the equipment under lease to you, we are assuming immediate possession of our equipment under the above two (2) Lease Agreements.

Yours faithfully,

United Orient Leasing Co. Sdn. Bhd.

(Sgd.)

Ng Seng Huat
Branch Manager.

On 4 September 1979, the appellant took out a warrant of distress for rent arrears: this however was not pursuant to a relevant Court authority therefor, and on 19 September at the instance of the respondent, claiming ownership of the equipment, the High Court on that ground discharged the warrant of distress.

On the same date, 19 September 1979, the appellant took out a warrant of distress, this time with the authority of a Court Order (Suit No. 12 of 1979), and served it on the bailiff of the Sessions Court.

On 22 October 1979, the Sessions Court ordered the release of the equipment to the respondent, the execution creditors not objecting. It would seem that the equipment was released to the respondent by the bailiff pursuant to that order on 22 October but immediately afterwards was or was purported to be seized under the warrant of distress in Suit No. 12 of 1979.

On 23 October 1979, the respondent issued an originating motion in the High Court in the proceedings the subject of this appeal, seeking an order that the equipment be released to the respondent. On 15 November 1979, Anuar J dismissed the motion with costs. On appeal by the respondent the Federal Court allowed the appeal on 2 April 1980. Final leave to appeal to the Yang di-Pertuan Agong was granted by the Federal Court on 4 August 1980.

The one question for discussion already mentioned arises under ss. 10 and 12 of the Distress Ordinance 1951 (No. 28 of 1951).

Section 10, so far as now material, provides that:

> Where any moveable property ... of any ... person ... not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or any part thereof, has been seized under a warrant of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such ... person may apply to a Judge ... to release a distrained article.

It is not disputed that the respondent is the owner of the equipment and otherwise fulfils the criteria of s. 10: thus there was jurisdiction to order the release of the equipment in these proceedings to the respondent if s. 10 applies.

It was however contended for the appellant that s. 10 was excluded by s. 12. Section 12, so far as material, provides as follows:

> The provisions of s. 10 shall not apply:
>
> (1) ... to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof;

The short point is whether in the light of the letter dated 3 September 1979, it could thereafter be said that the equipment was in the possession of the emporium by the consent and permission of the respondent. Counsel for the appellant accepted that he must surmount that hurdle at the outset (and before any discussion of reputed ownership) if he was to dispute the availability of s. 10.

It was accepted that consent to possession could be effectively withdrawn by a communication simply from the respondent to emporium, without the need to inform e.g. the landlord. But it was contended:

(1) that for effective withdrawal of consent it was necessary that the lease of the equipment should be wholly determined, which the letter of 3 September did not purport to do; (2) that that letter in the light of the language of the equipment leases was in any event not an act which would convey to emporium that consent was withdrawn.

On point (1), their Lordships' attention was drawn to the cases of *Times Furnishing Co.* v. *Hutchings* [1938] 1 KB 775 and *Smart Bros. Ltd. v. Holt* [1929] 2 KB 303 in the first of which it was held that though the hire purchase agreement was terminated the consent was not withdrawn, and in the second of which the agreement was terminated. These cases do not establish that the relevant consent cannot be withdrawn unless the relevant agreement of lease or hire is terminated, and their Lordships do not accept the proposition. Suppose the letter of 3 September were to have said expressly "Accordingly our consent to your continued possession of the equipment is hereby withdrawn", their Lordships do not see why that should not have effect according to its tenor: and in their Lordships' view that express statement is inherent in the letter which could not be understood in any other sense by emporium.

On point (2) it is necessary to look at the clauses of the lease agreements (in identical form) referred to in the letter.

Article 21, so far as relevant, provides as follows:

> Should any one of the following events take place the Lessor may without any prior notice or demand to the Lessee exercise any or all of the remedies as provided for in para. (1) of Article 17 hereof and the effects thereof shall be the same as those provided for in para. (2) of Article 17:
>
> (b) on the Lessee being the subject of any writ of execution or distress, attachment or disposition (regardless of whether or not the same affects the Equipment) ...

Article 17, so far as relevant, provides as follows:

> (1) If the Lessee fails to pay the Rent provided for in Article 3 hereof after the same becomes due and payable or any other sums and monies due and payable under this Lease Agreement or if the Lessee fails to observe or perform all and any provision of this Lease Agreement or if the Lessor shall on any reasonable ground consider itself insecure the Lessor shall without prejudice to any pre-existing liability of the Lessee to the Lessor have the right forthwith to exercise all or any of the following remedies without having to give any prior notice or demand to the Lessee:
>
> (b) to take possession to the Equipment or demand its return;
>
> (c) to terminate the lease hereby created and to demand from the Lessee the full amount of the agreed loss value and in addition thereto to claim from the Lessee for compensation for all loss and damages including but not limited to loss of profits.
>
> (2) Even if any of the remedies provided for in sub-paragraphs (a) and (b) of the para. (1) of this Article have been taken by the Lessor, the Lessee shall not be relieved from any other liability under this Lease Agreement including but not limited to liability for damages.

The contention was that the letter of 3 September was a bad notice because it does not fit the language of Articles 21 and 17 of the equipment leases. Their Lordships do not accept the relevance of that comment even if it were justified. The whole question is whether the letter sufficiently indicates a withdrawal of consent to continued possession of the equipment: and, as already stated, in their Lordships' opinion it clearly does.

Accordingly their Lordships are of the opinion that this appeal must be dismissed, with costs, and they advise His Majesty the Yang di-Pertuan Agong accordingly.

Also found at [1981] CLJ 164

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